No. 89-1863

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1989

THE HENRY & WARREN CORPORATION,
Petitioner,

—v.—

COBBLE HILL NURSING HOME, INC., and DAVID AXELROD, M.D., COMMISSIONER OF THE STATE OF NEW YORK DEPARTMENT OF HEALTH,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Should this Court issue its writ of certiorari to review the decision of a state court that did no more than apply principles of state law to find that a disputed price term of a contract was sufficiently definite to be enforced and direct entry of summary judgment of specific performance?

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Preliminary Statement

Respondents, Cobble Hill Nursing Home, Inc. and David Axelrod, M.D., Commissioner of the State of New York Department of Health, respectfully request that the Petition for a writ of certiorari to the Court of Appeals of the State of New York be denied.[1]

[1] Pursuant to Rule 29.1 Cobble Hill Nursing Home, Inc., states that it has no parent company, subsidiaries or affiliates.

Statement of the Case

A. The Petition and Jurisdiction of this Court.

Petitioner seeks a writ of certiorari to review the unanimous decision of the Court of Appeals of the State of New York that did no more than enforce, solely on grounds of state law, a contract between private parties for the sale of real property. No question of federal law was presented to or decided by the Court of Appeals, "necessarily" or otherwise. Petitioner does not claim that review by this Court is necessary to resolve any conflict among lower courts or to settle any question of general importance.

Petitioner's allegations that it was deprived of constitutional due process lack merit and bear no relationship either to the facts underlying the litigation or to the basis of decision in the court below. The decision for which review is sought set forth a standard by which to assess the definiteness of a contractual provision as a prerequisite to enforceability under New York law. Having refined that legal standard and applied it to the contract before it, the court determined the contract to be enforceable as a matter of law, there being no genuine issues of material fact, and directed an appropriate judgment of specific performance. The decision of the New York Court of Appeals presents no federal question that would confer jurisdiction on this Court and offers no issues of constitutional dimension, much less of importance, to merit this Court's attention. The petition for certiorari is patently without merit and should therefore be denied.

For more than a decade Petitioner has resisted performance of a contract that it freely entered into in order to prevent the incarceration of its principal, Eugene Hollander, and it continues that dilatory process with this frivolous

petition. The frivolous nature of the petition, and its obvious interposition solely to delay vindication of Respondents' rights, warrant the exercise of this Court's discretion under Rule 42.2 to award Respondents their just damages and double costs.

B. Background Facts.

In the mid-1970's a special investigation of fraud and conditions of care in the nursing home industry in New York resulted in regulatory reform and criminal fraud prosecutions. One of the principal figures and eventual targets of that investigation was Eugene Hollander, the president and, with his wife, the owner of Petitioner, The Henry and Warren Corporation ("Henry & Warren"). Henry & Warren was the owner of real property in Brooklyn, New York on which Hollander operated a 520-bed facility known as the Congress Nursing Home. (R.1a-2a).

In July 1975 Hollander was indicted by state and federal grand juries for crimes involving false claims for reimbursement for health and medical care for patients in his nursing homes. The indictments placed his operating certificates in jeopardy and Hollander requested that the New York State Department of Health (the "Department") appoint receivers to operate the homes. (R.2a). Negotiations ensued, but no receivers had yet been appointed when, in May 1976, Hollander entered a guilty plea to the federal charges and was sentenced to a five-year term of imprisonment and fined $10,000. The prison term was suspended and Hollander was placed on probation for five years on a condition that he "divest himself of all connection, direct or indirect, with any occupation that requires the custody or care of other people." (R.3a; 15a).

Hollander earlier had entered a plea of guilty to the state charges, but sentencing was delayed pending the outcome of the receivership negotiations. On May 17, 1976, the eve of the state sentencing hearing, Hollander and Henry & Warren entered into a lease and a receivership agreement with Respondent Cobble Hill Nursing Home, Inc. ("Cobble Hill"). (R.3a). Cobble Hill was formed by a group of local residents as a not-for-profit corporation specifically as an effort to save an important community institution. By having entered into these agreements Hollander was able to represent to the state court in the following day's sentencing hearing that he had removed himself from nursing home operations. The state court sentenced Hollander to five years' probation conditioned on payment of a fine of $250,000 and $1,000,000 restitution to the State, as well as permanent divestiture of all his nursing home interests. (R.4a).

The lease and the receivership agreement (collectively, the "Agreements") each contained, independently and by express incorporation of the other, a provision whereby Cobble Hill was granted an option to purchase the property from Henry & Warren at a price to be determined by the Department in accordance with applicable law and regulations. (R.3a; 15a). In the fall of 1979, Cobble Hill requested such a price determination. The Department calculated this price by relying on the regulations and formulas by which it valued real property for purposes of capital cost reimbursement under the Medicaid program. Under these rules an allowable transfer price is limited to the historical cost of the property less payments received by the owner as a return of its invested equity. After performing these calculations the Department stated that the purchase price as of January 1, 1980 was $3,046,352, to be reduced by any further reimbursement paid to Henry &

Warren for capital costs prior to a sale closing. Cobble Hill then exercised its option to buy the property. (R.4a).

Henry & Warren refused to perform its contract to sell the property at the price so determined. Rather than pursue the express remedy provided by the Agreements, a state law proceeding for review of the Department's determination, Henry & Warren brought an action in the United States District Court for the Eastern District of New York seeking to rescind the Agreements, alleging that it had been coerced and thus denied due process under the Constitution. The District Court dismissed Henry & Warren's claims under federal law for failure to state a claim and dismissed its state law claims for lack of pendent jurisdiction. (R.4a; 16a). Henry & Warren did not appeal from that judgment.

C. Nature of the Action

In June 1980, Cobble Hill commenced this action seeking specific performance of the purchase option in the Agreements. A separate action was commenced by Henry & Warren against the Department, later consolidated with that of Cobble Hill, in which Henry & Warren asserted, *inter alia,* that the Department acted improperly in fixing the purchase price at less than fair market value. (R.5a; 16a-17a).

D. The Proceedings Below.

On October 11, 1985 the Supreme Court, Kings County granted a motion by Cobble Hill for summary judgment, on a stipulation by the parties in open court, as to all questions of law, reserving for later determination "financial matters," such as the particular formulas and base calculations applied by the Department. On December 16, 1986, the scheduled date of trial on these issues, the trial court *sua*

sponte vacated the summary judgment stipulation, dismissed Cobble Hill's complaint and granted judgment to Henry & Warren. The purported ground for that action was the court's stated view that the delegation to a third party of a price determination with reference to applicable rules resulted in a failure, under its view of New York law, to state an essential contractual term and rendered the Agreements unenforceable. The court declined to hear evidence of the parties' intent as to this "ambiguous" term and refused to entertain argument on Cobble Hill's position that Henry & Warren's failure timely to challenge the Department's price determination in the manner provided in the Agreements barred its belated objections to enforcement of the purchase option. (R.5a; 17a-18a).

On appeal, the Appellate Division, Second Department, affirmed by a divided panel. (R.5a; 11a-22a). The same panel denied a motion by Cobble Hill for permission to appeal to the New York Court of Appeals. (R.28a). A similar motion by Cobble Hill to the Court of Appeals itself was dismissed on a jurisdictional ground, that the order appealed from did not "finally determine" the action. (R.27a). Cobble Hill then moved to reargue the dismissal of its motion for permission to appeal.

The "finality" of the earlier judgment meanwhile was demonstrated by the entry of an order by the trial court requiring Cobble Hill to vacate the nursing home property within six months and by entertaining a motion to increase, by a factor of ten, the rent Cobble Hill was to pay to Henry & Warren pending its eviction. The Court of Appeals granted the motion for reargument, vacated its earlier dismissal and granted permission to appeal. (R.6a). The court granted the Department leave to intervene in the appeal.

When the Court of Appeals considered the merits, it reversed the decisions below. After interpreting New York contract law, and stating the standard of definiteness required to enforce a contract, the court found that the parties to the Agreements had satisfied the standard, had manifested an intent to be bound and had provided a method for determining the purchase price without a need for any new expression by the parties. The court found that the purchase option contract was therefore enforceable on its terms and, the subject matter being the conveyance of real property, directed the entry of a judgment of specific performance (R.7a-10a), in accordance with familiar New York law.

A motion by Henry & Warren for reargument of the court's decision was denied. [Not reproduced in the Appendix.]

Reasons for Denying the Writ

This petition seeks review of a decision of the highest court of the State of New York that resolved a dispute about the interpretation of a contract by deciding and applying principles of state law. No questions of federal law were raised by Petitioner in its appeal nor were such questions passed upon in the decision below. The grounds for the writ now asserted by Petitioner, that it was deprived of its right to due process, in the form of a denial of a hearing as to (i) certain evidentiary issues and (ii) the "equity" of the relief ordered, raise no substantial issues of federal law.

1. The decision below rests entirely on state law.

This Court's jurisdiction to review the decisions of state courts is restricted to those in which federal questions are an issue. *See* 28 U.S.C. § 1257(a) (1984). Absent an affirmative showing that federal questions were necessarily

presented and passed upon by the state court, this Court should deny the petition for certiorari. *See Honeyman* v. *Hanan,* 300 U.S. 14, 18 (1937); *accord Lynch* v. *New York,* 293 U.S. 52, 54 (1934).

Contract law, and decisions that do no more than develop and apply contract principles, properly are determined solely as a matter of state law. *Memphis Natural Gas Co.* v. *Beeler,* 315 U.S. 649, 654 (1942). This case concerns only the interpretation and enforceability of a contract. The dispute on appeal was whether the contract's price term was sufficiently definite, with the consequence that the contract was to be either enforced or declared a nullity. The Court of Appeals conclusively determined that dispute and no more. No question of federal law was presented to or decided by the court below.

2. Petitioner raises no substantial constitutional question concerning the propriety of summary judgment on this record.

Petitioner claims a deprivation of due process by reason of the grant of summary judgment by the Court of Appeals on the record before it. The decision by the Court of Appeals was a straightforward application of orthodox summary judgment procedures on the strength of a record devoid of a genuine issue of material fact in the light of state substantive law; it presents not even a colorable issue of due process.

The specific evidence that Henry & Warren claims it was given no opportunity to present is irrelevant to the judgment of the court below. As a matter of substantive state contract law, if a contract is unambiguous then parol evidence of the subjective intent of the parties when entering into the agreement is inadmissible to vary the contract's terms.

Judnick Realty Corp. v. *32 West 32nd St. Corp.*, 61 N.Y.2d 819, 822, 462 N.E.2d 131, 133, 473 N.Y.S.2d 954, 956 (1986); *Mallad Constr. Corp.* v. *County Fed. Sav. & Loan Ass'n*, 32 N.Y.2d 285, 290-91, 298 N.E.2d 96, 99-100, 344 N.Y.S.2d 925, 929-31 (1973). The Court of Appeals expressly found that "[t]he terms of agreement and the appropriate remedy can be readily determined, and it is plain that the parties intended this to be a complete and binding contract." (R.9a). Petitioner's assertions respecting its intent, or absence thereof, on how the Department was to calculate the purchase price (Petition at 6-7) thus miss the mark.

The court below specifically addressed and rejected the argument that Petitioner's subjective intent as to the price term could be proved to avoid its obligation: "[I]t is apparent from the agreement that these parties reposed discretion in the Department to make the price determination, limited only by the requirement that it apply provisions that were suitable, pertinent and appropriate for the task at hand." (R.8a). Henry & Warren objects in reality, not to a lack of opportunity to be heard, but to its failure, having been heard, to persuade the Court of Appeals of the merits of its arguments.

Equally without substance is Henry & Warren's claim that the court below deprived it of due process by functioning as a court of equity and directing the entry of summary judgment granting Respondent Cobble Hill specific performance without further evidentiary hearings. Petitioner invokes the body of maxims of equity jurisprudence in aid of this contention. But the application of those maxims to the facts of record in order to devise an appropriate remedy is entirely a matter of state, not federal, law; the jurisdictional barrier erected by that fact is not avoided by Peti-

tioner's argument. Nor does a bare allegation that a state court of equity failed to "do justice" on the merits transform Petitioner's disgruntlement into an issue of due process, and Henry & Warren fails to demonstrate that the elements of due process were lacking in the hearing it received.

Petitioner is in error when it asserts the existence of an established constitutional requirement in every case involving an equitable remedy that a court, having found that remedy to be appropriate and warranted, must order a subsequent evidentiary hearing on the identical issues. As a matter of New York state contract law, where the subject matter of a contract is the sale of real property, specific performance is a customary and appropriate remedy in a successful action for a breach of the contract. *See, e.g., S.E.S. Importers, Inc.* v. *Pappalardo,* 53 N.Y.2d 455, 468, 425 N.E.2d 841, 848, 442 N.Y.S.2d 453, 460 (1981); *Judnick Realty Corp.* v. *32 West 32nd St. Corp.,* 61 N.Y.2d 819, 823, 462 N.E.2d 131, 133, 473 N.Y.S.2d 954, 956 (1984); *Van Wagner Advertising Corp.* v. *S&M Enters.,* 67 N.Y.2d 186, 192, 492 N.E.2d 756, 759, 501 N.Y.S.2d 628, 631 (1986).

Moreover, the state court considered the matters now raised by Henry & Warren in its petition and rejected them on the merits. The court found that Henry & Warren freely entered into the Agreements with Cobble Hill and received the bargained for consideration (R.8a-9a) and that Petitioner's "contention that, under this agreement, it is somehow entitled to the equivalent of fair market value is simply without substance." (R.9a). After explicitly addressing the definiteness of the price term and the parties' clear intent to be bound by the contract, the court concluded that "to declare this defendant's promise legally meaningless—thus allowing it to walk away with its property after enjoying the benefits of the bargain—defeats the reasonable

expectations of the parties in entering into the contract and is a misuse of the indefiniteness doctrine." (R.9a). Petitioner's claim that it was not afforded an opportunity to address these issues does not accord with the facts. Its assertion that due process requires a second hearing of the same issues is absurd.

In sum, Petitioner improperly seeks review by this Court of the judgment of a state court where that court was neither presented with nor passed upon any question of federal law. Henry & Warren had the opportunity of a hearing to present each of the issues recited in the petition and its contentions were rejected in or rendered irrelevant by the view of state substantive law adopted by the Court of Appeals. Henry & Warren's petition should be denied.

The Court Should Award Damages Against Petitioner Under Rule 42.2

Rule 42.2 of this Court provides that:

> When a petition for a writ of certiorari, an appeal or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or applicant, or against the party's attorney or against both.

The Petitioner has stated no grounds to invoke the jurisdiction of this Court, has misrepresented the facts regarding the issues presented to and decided by the court below and has asserted no colorable legal grounds for the arguments by which certiorari is sought.

Moreover, the Court of Appeals carefully traced the decade-long effort by Petitioner to avoid its responsibility to

convey the nursing home to Cobble Hill under the Agreements (R.1a-6a) and alluded to the "human drama" (R.1a) that threatened the housing of "more than 500 elderly residents." (R.6a). The submission of this transparently frivolous petition can only be for the purpose of further delay at continued cost to Respondents, to the residents of the nursing home and to the courts. An exemplary and compensatory award of damages and double costs to Respondents is fully justified and is hereby requested.

Conclusion

For the reasons set forth above, Respondents Cobble Hill Nursing Home, Inc. and David Axelrod, M.D., Commissioner of the State of New York Department of Health respectfully request that the instant petition for a writ of certiorari to review the decision of the Court of Appeals of the State of New York be denied and that Respondents be awarded appropriate damages and double costs pursuant to Rule 42.2 of the Rules of the Supreme Court.

Respectfully submitted,

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